*In the*

# Supreme Court of the United States

OCTOBER SESSION, 1957

No. 596

CHARLES G. EMERLING,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

## *Petition for Writ of Certiorari*

TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cause on August 28, 1957.

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The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, p. 13.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1957 (Appendix, infra, p. 30). A timely petition for rehearing was filed by petitioner, and this petition was denied on October 3, 1957. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

## QUESTIONS PRESENTED

(1) Whether the passing of alleged false writings from one individual defendant to another individual defendant and later used by parties not named in the indictment some eight months later constitutes an offense under Section 1001, Title 18, United States Code.

(2) Whether in a prosecution under a felony indictment for making and using false statements in a matter within the jurisdiction of a department or agency of the United States under Section 1001, Title 18, United States Code, the trial Court is permitted by Rule 31(b) of the Federal Rules of Criminal Procedure to give an instruction which required the jury to return a joint verdict only of guilt or innocence and thus depriving the defendants of the benefits of said Rule 31(b).

(3) Whether the opinion of the Court below is in conflict with the opinion of the Circuit Court of Appeals for the Fifth Circuit in *Lowe v. United States*, 141 F. (2d) 1005.

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(3) Whether the opinion of the Court below is in conflict with the opinion of the Circuit Court of Appeals for the Fifth Circuit in *Lowe v. United States*, 141 F. (2d) 1005.

## STATUTES AND RULES INVOLVED

Rule 31(b), Federal Rules of Criminal Procedure, provides:

> "Several Defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again."

18 U.S.C. § 1001, provides:

> "Statements or entries generally. Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

## STATEMENT

Petitioner, together with one Joseph Mary Ebeling, was convicted by a jury on eight counts of violations of Section 1001, supra, and of one count of conspiracy under Section 371, Title 18, United States Code, under a nine-count indictment, and was sentenced to imprisonment for a period of 12 months on each count of the indictment to run concurrently with each other and in addition, a fine of $2500.00 was imposed on the ninth count of the indictment, the conspiracy count. The indictment in the first eight counts (R. 1-8) accused petitioner, together with the said Joseph Mary Ebeling, with making and using false

writings containing false statements and entries in a matter within the jurisdiction of a department or agency of the United States, the Department of the Army, Ordnance. The only items of difference in each of the first eight counts were dates, amounts of money and number and kind of parts contained in certain invoices; each count represented a separate invoice issued by a company operated by Joseph Mary Ebeling to a corporation of which petitioner was president. The ninth count (R. 8-12) accused the petitioner of conspiring with the said Joseph Mary Ebeling and other individuals and a corporation which were not indicted, to commit the offenses set out in the other counts of the indictment.

The petitioner was president of Production Engineering & Manufacturing Co., a manufacturing corporation, and Joseph Mary Ebeling was manager of a business operated under the trade name of Manchester Machine Co. (R. 1).

Production Engineering & Manufacturing Co., the corporation, obtained a contract from the Department of the Army, Ordnance, in May, 1951, to produce mortar conversion kits for said department. The contract contained a price redetermination clause, which required the filing of a statement of its costs to produce the said kits, which was submitted by the corporation in January, 1953 (R. 21).

In March, April and May, 1952, while the contract was in force, Production Engineering subcontracted to Manchester Machine Co. to perform certain machine work on three of the component parts going into the mortar conversion kit assemblies. Production Engineering executed three purchase orders to Manchester Machine, requesting performance by the latter of certain machine shop operations on 1,200 adapters at a total price of $7,776.00, on 1,200 housings at a total price of $9,888.00, and on 2,500 strikers at a total price of $8,050.00, respectively (R. 29-30).

The government prosecuted its case on the theory that the machine work ordered by Production Engineering Co. to be performed by Manchester Machine Co. was never actually performed by the latter; that Joseph Mary Ebeling, individually, prepared certain invoices indicating the work had been done and presented the same to the corporation, Production Engineering, and that Manchester Machine Co. received payment therefor, in the total amount of $20,298.24 (R. 19); that the invoices of Manchester Machine so paid for by Production Engineering were, some eight months later, incorporated in a statement of costs of production of said mortar conversion kits, prepared by certified public accountants of Production Engineering, which statement was signed by the executive vice-president of the corporation, not a party to the indictment, and presented to the St. Louis Ordnance District, Department of the Army, Ordnance, St. Louis, Missouri (R. 58-60).

The evidence on behalf of the government tended to establish that the only connection petitioner had to the invoices in issue was that he was a president of the corporation at the time in question; that, as president, he signed the checks issued in payment for the invoices of Manchester Machine Co. (R. 31-32); and that he and the manager of Manchester Machine Co., Joseph Mary Ebeling, were friendly (R. 54).

The indictment alleged, and the government's theory of the case was, that the designated invoices were furnished by the individual Joseph Mary Ebeling to the individual, petitioner, Charles G. Emerling, and became a part of a statement of costs of a corporation, Production Engineering & Manufacturing Co., which was submitted by the corporation to a department or agency of the United States (R. 1-8).

The evidence was undisputed that petitioner had no physical, actual or constructive participation in or to the

making of the questioned invoices (R. 62) or making of the statement ultimately filed with the Department of the Army, Ordnance, or the signing and presenting of the same to the pertinent agency (R. 59).

The Court below held, in effect, that notwithstanding the evidence of a document passing from an individual to a private corporation, which document was never presented to a department or agency of the United States, was within the jurisdictional requirements of Section 1001, supra. The Court below, in affirming the conviction, further held that tangible acts of participation by petitioner in the crime can be drawn from the fact that he signed the checks in payment, was friendly with the co-defendant, Joseph Ebeling, that it could have been petitioner who authorized issuance of purchase orders and that the co-defendant, Joseph Mary Ebeling, when visiting the Production Engineering factory would call either upon the son, Carl Emerling, named as a co-conspirator not indicated, or his father, the petitioner herein.

The trial Court instructed the jury on the ground that the substantive counts had charged that petitioner and Joseph Mary Ebeling jointly had done the acts involved and in its charge, the trial Court stated that it was not sufficient as a basis for a conviction against them that one of them may have known that the invoice involved was a false writing, but that the jury had to find, before it could convict, that "the knowledge of falsity and intent as to use in a matter within the jurisdiction of the Department of the Army, Ordnance, be known and intended by both defendants" (R. 97).

The Court below held that Rule 31(b) in this instance did not apply and that any error committed in so instructing was beneficial and not harmful.

## REASONS FOR GRANTING THE WRIT

1. This case raises important questions concerning the application of the jurisdictional requirement contained in Section 1001, Title 18, supra, as applied by the Circuit Court of Appeals for the Fifth Circuit in *Lowe v. United States*, 141 F. (2d) 1005, and as applied by the Court of Appeals below in the instant case.

The Court below held that the false document need not itself be presented to the pertinent department or agency of the United States, but that the statute "contemplates as well any knowing, making or using of such a document *in intended relationship to a matter* that is within the jurisdiction of said department or agency." (Emphasis supplied.)

The Court below distinguished the Lowe case, supra, from the instant case, on the ground that the "mere circumstance that the employer was entitled to reimbursement from the United States as not of itself being sufficient to require that the employee's receipt of his wages and his statements in relation thereto be regarded as a matter that was within the jurisdiction of a department or agency of the United States." The Court below further stated, at page 10 of its opinion, as follows:

> "We read the opinion as implying that there was in that case no charge, or anything to show, that the employee knew that the work which he was doing, and the wages which he claimed, had been made the subject of an express contract provision between his employer and the government, constituting them a matter of direct charge and reimbursing obligation on the part of the United States; that the working time which he turned in thus necessarily would be a matter which was to be used against the government and as to which it accordingly had a right of audit and adjustment; and that in making the false statement with which he

was charged, he had turned it in on this basis and with the intent that it was to be accepted and used in that relationship."

It is respectfully submitted that there is no factual difference between the ruling of the Circuit Court of Appeals for the Fifth Circuit and the facts as pertaining to petitioner in the instant case and that there is a conflict of opinion between C.C.A. 5 and C.C.A. 8.

2. Rule 31(b) provides for separate verdicts in the case of each defendant when a trial is had on an indictment charging two or more defendants with the same crime.

The trial Court, by its charge, in effect, required the jury to find the defendants both guilty or both innocent which charge would open the door for a jury to find the guilt of one defendant based upon evidence adduced solely against the other. The countervailing policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against someone else. *United States v. Toner*, 3rd Cir., 173 F. (2d) 140, 142.

The Court below held that the charge as given, " * * * in its effect, required the jury to find that each one of them individually was guilty of all elements of the crime before there was a right to convict, but on the basis of the other instruction, prohibited the returning of any verdict whatever of conviction even though one of them might have been proven guilty unless the jury found that the other also had been proved to be so guilty." The Court further concluded that the charge as given was according an improper benefit and neither defendant could claim that any error committed was prejudicial.

The opposite conclusion can be reached that such an instruction can be highly prejudicial to an innocent defendant who would be found guilty after the guilt of his

co-defendant has been established to the satisfaction of a jury. It is therefore the position of the petitioner that the trial Court improperly charged the jury by requiring a finding of joint innocence or guilt by failing to observe the requirements of Rule 31(b), supra.

3. The jurisdiction as set out in the statute, Section 1001, Title 18, supra, requires the use of a false writing to be in a matter within the jurisdiction of any department or agency of the United States. The indictment in counts one through eight charges in part:

> "3. Said false writing was an invoice * * * issued by Manchester for purported charges * * * for machine shop operations on * * * said mortar conversion kits pursuant to a purchase order issued by PEMCO to Manchester. * * * In truth and in fact the work described in said purchase order and said invoice was not performed either in whole or in part, and each and every statement and entry in said invoice was false, fictitious and fraudulent. Said invoice was furnished by defendant Ebeling to defendant Emerling and became the basis of a portion of costs contained in a statement presented by PEMCO to the Department of the Army, Ordnance, on or about January 6, 1953, for the purpose of repricing."

It will be seen that the actual passage of the questioned document was from the individual Joseph Mary Ebeling and the individual Charles G. Emerling as charged by the indictment (R. 1-8).

The Circuit Court of Appeals for the Eighth Circuit in *Terry v. United States*, 131 F. (2d) 40, which followed *United States v. Dietrich*, 126 F. 676, stated as follows:

> "This is a prosecution for a criminal offense. To be punishable, the act charged must have possessed at the time when its commission was complete, every

> element necessary to its criminality under the statute. A completed act which is not an offense at the time of its commission cannot become such by any subsequent act of the party charged, or of another, with which it has no connection; and this is true whether the first act was done for a good or bad purpose * * *."

The indictment on its face, therefore, reveals that a third party intervened in the actual presentment of a document, not the alleged spurious documents, but a separate and distinct instrument—the statement of a corporation's costs of production, which was prepared by persons other than the petitioner. The document ultimately arriving at the offices of the Ordnance District was the work product of persons independent of the petitioner who had nothing to do with its preparation (R. 97).

The record reveals that the statement of costs was prepared by auditors, acting in a capacity of independent contractors, and signed and presented by a person other than petitioner (R. 97). The undisputed testimony offered by the government requires a finding that to come within the jurisdictional requirement of the statute, a crime is completed when one person hands another a document which by mistake, inadvertance or other unintentional circumstances becomes incorporated on a document later presented or delivered to a governmental agency. The Court below apparently so found that mere deposit with a private corporation of a document later questioned by indictment meets the requirement of jurisdiction as required by statute and disregarded any possibility of intervention by third persons under any combination of circumstances.

The petitioner respectfully urges that the crime of making and using a false writing containing false statements and entries in a matter within the jurisdiction of a department or agency of the United States has not been met.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX

### OPINION

# United States Court of Appeals

**FOR THE EIGHTH CIRCUIT**

No. 15,582.

Joseph Mary Ebeling and Charles G. Emerling, Appellants.

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[August 28, 1957.]

Michael J. Ebeling for Appellant Joseph Mary Ebeling.

Ted A. Bollinger, Jr., for Appellant Charles G. Emerling.

Forrest Boecker, Assistant United States Attorney, (Harry Richard, United States Attorney, with him on the brief) for Appellee.

Before JOHNSEN, VOGEL and VAN OOSTERHOUT, Circuit Judges.

JOHNSEN, Circuit Judge.

Ebeling and Emerling, the appellants here, were jointly charged, in an indictment of 9 counts, with 8 violations of 18 U.S.C.A. § 1001 and a violation of the conspiracy statute, 18 U.S.C.A. § 371. The indictment ran against them alone. On a trial to a jury, each was convicted on all 9 counts.

Section 1001, in its here material portion, makes guilty of a criminal offense anyone who, "in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully * * * makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry * * *".

Ebeling was manager of a business, operated under the trade name of Manchester Machine Co. Emerling was president of Production Engineering & Manufacturing Co., a manufacturing corporation. Both enterprises had their location in or near the city of St. Louis, Missouri

Production Engineering obtained a government contract in 1951, to produce mortar conversion kits for the Department of the Army. The contract contained a price redetermination clause, which required the filing of a statement of the costs involved in kits produced. And, under 50 App. U.S.C.A. § 1214, such a defense contract and any subcontract related thereto were automatically subject to a right of renegotiation on the part of the government, both against the prime contractor and against a subcontractor, for "the elimination of excess profits".

The exact amount of production which had occurred under the contract is not shown by the printed record, except that the bill of particulars filed by the government states that there had been paid to Production Engineering, on billings by it for kits produced, the sum of $602,608.56, and that the Army was claiming the right to have further credited on such billings the sum of $289,979.09, from overpayments made to Production Engineering on some other contracts. What production and billing there may have been beyond this does not appear, nor is the matter, or any of the other facts referred to in this paragraph, of moment here.

In 1952, while the contract was in force, Production Engineering purported to subcontract to Manchester Machine the doing of some machine work on a number of parts for the kit assemblies. It executed three purchase order forms in favor of Manchester Machine, ostensibly requesting performance by the latter of some code-numbered operations, on 1200 "adapters" at a price of $7776, on 1200 "housings" at a price of $9888, and on 2500 "strikers" at a price of $8050, respectively.

There is nothing to suggest that Manchester Machine ever had submitted any bid for the doing of this work or at the price set out in the purchase orders. The government's evidence showed, and entitled the jury to find, that the whole thing constituted a spurious affair, done for the purpose of defrauding the government; that the assembly-kit parts covered by the purchase orders were never sent out by Production Engineering to Manchester Machine for the doing of such machine work; that Manchester Machine never engaged in doing the work; but Manchester Machine, however, sent invoices to Production Engineering indicating that the work had been done and making charges therefor, in the amount of $20,298.24; and that Production Engineering made payment of these invoices and incorporated the fictitious charges contained therein in the statement of costs which it submitted to the Department of the Army.

Various incidental cover-up activities were also shown to have been engaged in, at the plants of both Production Engineering and Manchester Machine. Thus, the evidence entitled the jury to find that requisitions of material, together with shipping tickets, were falsely executed at the Production Engineering plant, in order to make it appear that adapters, housings and strikers had been duly sent out to Manchester Machine; that similarly shipping

tickets were falsely executed at the Manchester Machine plant, to make it appear that the finished parts had been sent back to Production Engineering; and, further, that inspection tickets were falsely executed at Production Engineering, to evidence receipt and inspection of the returned finished parts.

The conspiracy count set out the names of a number of employees at Production Engineering, as having joined in the conspiracy, in that they knowingly had helped to carry on some of the cover-up activities, but they were not indicted, since they apparently had only done what they as employees had been directed to do. Ebeling had not been quite so successful in getting cooperation from the employees of Manchester Machine, in the carrying out of his end of the fraudulent scheme. There was testimony showing that he had turned the three false purchase orders issued by Production Engineering over to one of his employees and directed that bills or invoices for charges be issued against the orders, but that the employee had refused to do so, stating that he knew that no such work had been done in the plant and that he did not want to have anything to do with the matter. The employee testified that Ebeling then tried to assure him that it was all right to make out the invoices against Production Engineering; that he had a "deal" with appellant Emerling; and that the employee did not need to be afraid of anything. When the employee still refused, Ebeling went into his private office and engaged in typing out the invoices himself. He also filled out some false shipping tickets, to indicate the return to Production Engineering of the fictitious finished parts.

As to tangible acts on the part of appellant Emerling, there was evidence from which the jury could properly find that it was he who had given the instructions at Pro-

duction Engineering for the issuance of the specious purchase orders in favor of Manchester Machine and he who had signed the checks for the payment of the specious invoices sent in by appellant Ebeling—with the papers being sent through the routine of the business for inclusion in Production Engineering's statement of costs to the government. Ebeling had admitted to one of the government's investigators that he and Emerling were personal friends of several years standing, having visited in each other's home and having taken a number of vacation trips together. There was testimony showing that during the period involved Ebeling came to the Production Engineering plant a number of times and always met with Emerling or Emerling's son—the latter being named, but not indicted, as a conspirator, and being used on the trial as a government witness. Such dealings and relations as necessarily underlay the situation were entitled to be found, on the circumstances shown, to have occurred entirely between appellant Ebeling and appellant Emerling directly, or with Emerling's son, when on occasion the father happened not to be present at the plant.

Each of the 8 substantive counts under 18 U.S.C.A. § 1001 related to the making and using of one of the 8 false invoices, by which Production Engineering was billed; on the basis of which Production Engineering issued its checks to Manchester Machine; and for whose amounts a charge was included in the statement of costs filed with the Department of the Army under the requirement of the contract.

As to each invoice, the applicable indictment count in substance alleged that it constituted a false writing within the purview of 18 U.S.C.A. § 1001; that all of its statements were false, fictitious and fraudulent; that both Ebeling and Emerling so knew; that Ebeling had fur-

nished the invoice to Emerling as a charge for purported work done under Production Engineering's government contract; that it was intended by Ebeling and Emerling that the charge therein should be, and it was, included from the invoice as a part of the costs listed in the statement presented by Production Engineering to the Department of the Army under the price redetermination clause of the contract and the government's renegotiation right; and that Ebeling and Emerling thus had made and used a false writing, knowing it to contain false, fictitious and fraudulent statements and entries, "in a matter within the jurisdiction of the Department of the Army, Ordnance, a Department and Agency of the United States", and so had violated 18 U.S.C.A. § 1001.

The conspiracy count alleged in substance that Ebeling and Emerling had conspired together (in which conspiracy certain named, but unindicted, employees of Production Engineering, and other persons whose names were declared to be to the grand jury unknown, had joined) to defraud the United States, by preparing, keeping and presenting false records and accounts of the costs of Production Engineering in performing its government contract, and particularly the costs of purported subcontracts on the part of Manchester Machine, to the end that Production Engineering's costs under the contract would be wrongfully increased.

In greater fullness, count 9 charged that Ebeling and Emerling, in conspiracy and confederation, had entered into an agreement or understanding, to cause purchase orders to be executed on Production Engineering's forms, to falsely indicate allotments of subcontract work by Production Engineering to Manchester Machine; to cause material requisitions to be executed, to falsely indicate the furnishing of mortar-kit parts to Manchester Machine for

the performing of such work; to cause shipping tickets to be executed, to falsely indicate that mortar-kit parts had been sent to Manchester Machine for purposes of such subcontract work; to cause inspection tickets to be prepared, to falsely indicate that finished parts from Manchester Machine had been returned to and checked by Production Engineering; and to cause false invoices to be prepared, making wrongful charges against Production Engineering for such purported subcontract work—which invoice charges Production Engineering was to include in its contract costs. Nineteen specific overt acts, in furtherance or accomplishment of the object of the conspiracy generally were set out, but it is not necessary to detail or discuss these here.

The principal contention urged for reversal is that, neither on the charges made nor on the facts proved as to counts 1 to 8, was it possible for appellants to be guilty of a violation of 18 U.S.C.A. § 1001, because it was not claimed or shown that the invoices themselves were presented to the Department of the Army. It is argued that a writing or document cannot be regarded as being within the jurisdiction of a department or agency of the United States, unless it has been physically presented to such department or agency for consideration, action or reliance, and that only on this basis can a crime exist under § 1001.

We do not believe that the term "jurisdiction", as related to the making or using of a false writing or document, is employed in this technical or limitative sense in the statute involved. Other courts have had occasion to consider the question and have held that § 1001 does not require that a false statement or document must itself have been presented to a department or agency of the United States but that it contemplates as well any knowing making or using of such a statement or document in

intended relationship to a matter that is within the jurisdiction of the department or agency. See e. g. *United States v. Myers*, D.C. Cal., 131 F. Supp. 525, 530; *United States v. Giarraputo*, D.C. N.Y., 140 F. Supp. 831, 834.

We agree. In more explicit terms, we are of the opinion that it constitutes a violation of § 1001, for anyone willfully to make or use a false writing or document, knowing that it contains a false, fictitious or fraudulent statement or entry, and intending that it shall bear a relation or purpose as to some matter which is within the jurisdiction of a department or agency of the United States, and with the false, fictitious or fraudulent statement or entry which it contains having a materiality on the department or agency matter. If the false writing or document constitutes a legally required record under a statute in some regulatory field, there may perhaps be an even broader liability under the section, but that aspect is not here involved and calls for no consideration.

*United States v. Mellon*, 2 Cir., 96 F. (2d) 462, *Terry v. United States*, 8 Cir., 131 F. (2d) 40, and *Lowe v. United States*, 5 Cir., 141 F. (2d) 1005, illustrates the application of the condition of intended relationship.

In the *Mellon* case, the defendant had applied to a local bank for a loan insured under the provisions of the National Housing Act, 12 U.S.C.A. § 1701 et seq., and had made some willfully false and material statements in the application executed by him. He was indicted and convicted under 18 U.S.C.A. § 80, of which § 1001 is the counterpart in the 1948 code revision. He contended, among other things, that no violation of the statute could exist, because the false statements had been made only to the bank and not to a government department or agency. The court, in affirming the conviction, said that "The statements were in fact made to obtain a loan insured

under the National Housing Act", and that "The application for such a loan was itself a matter within the jurisdiction of an agency of the United States". 96 F. (2d) at p. 463.

In the *Terry* case, the Court regarded the evidence in the particular situation presented as not sufficiently showing that the defendant, in making application to a local bank for a loan, was seeking to obtain one under the National Housing Act, or that the bank at the time could be said to have intended the loan to be of that nature, or that, if it did, it made known to the defendant that the dealings between them were upon that basis. Thus, the effect of the decision was that the evidence as appearing in the record did not establish a situation of intention that the false application should have relation to a matter within the jurisdiction of a department or agency of the United States. The opinion, however, must be read, we think, as implying that, if the evidence had been sufficient to show that "the statements were in fact made to obtain a loan under the National Housing Act," as in the *Mellon* case, supra, the conviction would not have been reversed.

In the *Lowe* case, the conviction of an employee was reversed, under a charge that he had violated 18 U.S.C.A. 80 by making a false statement to his employer, a private corporation, as to the number of hours that he had worked on a particular day—the corporation being at the time engaged in building ships for the United States Maritime Commission, an agency of the United States, under a contract calling for the employer to make payment to his employees of their wages but to have reimbursement made to it therefor by the Treasury of the United States.

The Court regarded the mere circumstance that the employer was entitled to reimbursement from the United

States as not of itself being sufficient to require that the employee's receipt of his wages and his statements in relation thereto be regarded as a matter that was within the jurisdiction of a department or agency of the United States. It said that the obligation for reimbursement "did not effect any change in the relationship existing between the company and private employee," and that, "Insofar as the employee was concerned, every aspect of his employment was exactly the same as it would have been had there been no contract with any government agency of any kind." 141 F. (2d) at p. 1006.

We read the opinion as implying that there was in that case no charge, or anything to show, that the employee knew that the work which he was doing, and the wages which he claimed, had been made the subject of an express contract provision between his employer and the government, constituting them a matter of direct charge and reimbursing obligation on the part of the United States; that the working time which he turned in thus necessarily would be a matter which was to be used against the government and as to which it accordingly had a right of audit and adjustment; and that in making the false statement with which he was charged, he had turned it in on this basis and with the intent that it was to be accepted and used in that relationship.

On the language and purpose of § 1001, we are unable to see any legal reason why an employee would not be guilty of an offense under the statute, if his work consisted in performing tasks under a defense, cost-plus contract between his employer and the government; if he had knowledge of the existence of the contract and of the fact that the work which he was doing was in performance of it; if he knew that the wages paid him were to be reimbursed as such to his employer by the government; and

if he willfully engaged in turning in a false, written statement of the hours worked by him, for the purpose of receiving wages not due him, and with the accompanying intent in these circumstances that the statement was to be accepted and used as a basis for the obtaining of reimbursement by his employer from the government, under the statutory power in a department or agency thereof to examine the legitimacy and correctness of the charges involved and with the right to rely upon the employee's statement as a component in the matter.

We can accordingly see nothing legally in the *Terry* and *Lowe* cases that helps appellants here, as they seem to believe. But beyond this, the factual situation in the present case is in any event not akin to those in the *Terry* and *Lowe cases*. Here, the matter of personal intent on the part of both Ebeling and Emerling to have the statements in the false invoices, which they had designed to have prepared, bear a relation to, by becoming a part of, the fraudulent cost statement which Emerling was to submit to the government, under the price redetermination clause of the contract and under the government's statutory renegotiation right, is not one of probative weakness, such as in the *Terry* and *Lowe* cases.

Further, the charges made under the purported subcontracts in favor of Manchester Machine were here directly linked to the statement of costs filed on behalf of Production Engineering, by 50 App. U.S.C.A. § 1214, in that under the statute the prices paid to a subcontractor were themselves made subject to examination and renegotiation as against the subcontractor himself. As matter of fact, the purchase orders which appellants engaged in using had stamped on their face, "This contract is subject to the Renegotiation Act of 1951 and is deemed to contain all provisions of Section 104 of that Act." Hence, the in-

voices which appellants caused to be prepared, as representing charges made for subcontract work, would of themselves be, on the language of 18 U.S.C.A. § 1001, "in a matter within the jurisdiction of a department or agency of the United States."

Each appellant has made some separate, technical arguments as to the insufficiency of the indictment and the evidence to sustain a conviction against him, both on the substantive counts and on the conspiracy count. Our reading of the record shows no merit in any of these contentions. They are of scattered-shot calibre and import only and call for no formal discussion.

The facts and circumstances shown by the record, and the inferences which reasonably could be drawn therefrom, amply entitled the jury to find that Ebeling and Emerling, in their personal friendship, had seized the opportunity, and come to an agreement or understanding, to use Production Engineering's mortar-kit contract to allow Manchester Machine to make charges and receive payments for fictitious subcontract work, and to cast the burden of these fraudulent charges and payments upon the government; that they were to, and did, carry out their fraudulent scheme by causing Production Engineering to issue spurious purchase orders to Manchester Machine and having various cover-up incidents, such as the issuing of false shipping tickets, etc., done at the two plants; that one of the things which they intended, and which Ebeling did on behalf of both of them, was the drawing up and submitting to Production Engineering of fictitious invoices or bills from Manchester Machine, for inclusion in the statement of production costs transmitted to the Department of the Army for pricing and payment purposes; that they thus both had engaged in a conspiracy to defraud the United States; and that, in having together knowingly caused

the several false invoices to be made and used, with the object of having the fictitious invoice work-charges carried into and made a part of the statement of production costs to be submitted for the government's consideration, they both also had been guilty of the several substantive offenses charged against them, of knowingly and willfully making and using a false writing or document, knowing it to contain a false, fictitious or fraudulent statement, and intending it to have a relationship or purpose in a matter within the jurisdiction of a department or agency of the United States.

In their joint scheme and intent to have the invoices made, they both were in law chargeable with a making of the writings, which they had so caused to be drawn up. And they both also had engaged in the alternate element of offense under the statute, of using the writings. The indictment charged them with a single offense, in having both made and used the writings. The evidence entitled the jury to find them guilty of having done both of these acts. The sufficiency of the evidence to sustain either of these elements or aspects of offense under § 1001 would, however, legally leave their conviction subject to affirmance.

The contention is made that the Court erred in receiving in evidence a sample of an adapter, a striker, a housing and an assembled kit, because the exhibits were not in the same condition as they would have been as raw parts, in relation to the time when the crime was alleged to have been committed. The physical objects, however, were not offered as having constituted instrumentalities in the commission of the crime, and the proof-of-same-condition rule upon which appellants rely, 2 Wharton Criminal Evidence, 11th ed., § 757, therefore has no application.

The trial Court could properly receive the exhibits, to enable the jury to understand what the terms "adapter", "striker", "housing" and "mortar conversion kit," as used in some of the document and testimony before it, had reference to 3 Wigmore on Evidence, 3rd ed., § 790. And the Court had the discretion further to allow the objects to be used demonstratively, by an exhibiting of them to the employees of Manchester Machine and Production Engineering, whom the government called as witnesses, in connection with their testimony that no such machining of parts, as had been charged for in the invoices, had ever been done at the Manchester Machine plant. This demonstrative use could, of course, beyond the matter of their negative identification by the witnesses, also cause the objects themselves to serve as circumstantial, corroborative evidence of the fact that the invoices constituted false writings.

We can see no force, on the record before us, in appellants' argument that, because the exhibits consisted of finished parts, upon which all the machining work had been done, they were not competent as a basis for the witnesses to make a negative identification, or for use otherwise as circumstantial evidence, in relation to whether Manchester Machine had done some intermediate work, in that it might have been possible that the witnesses could not identify the unfinished parts in their finally completed state. But, in any event, that question was controllingly one for the discretion of the trial Court, since the evidence was not within any legal rule of absolute exclusion. Much discretion as to the admitting of circumstantial evidence, especially where fraud is involved, must be allowed the trial Court, "and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact." *Clune v. United States*, 159 U.S. 592,

593, 16 S.Ct. 125, 126, 40 L.Ed. 269; *Harper v. United States*, 8 Cir., 143 F. (2d) 795, 803.

Appellants' contention that the government was improperly allowed to impeach the testimony of one of its own witnesses is without any merit. The same is true of the contention of appellant Emerling that it was error to allow the use against him of the testimony of the employee of Manchester Machine, who had refused to prepare the false invoices for Ebeling, that Ebeling had stated that he and Emerling had a "deal" as to the making of the invoices. Establishedly, declarations of one member of a conspiracy, or of one of the joint members of some other unlawful undertaking, are admissible against members not present, where the declarations have been made for the purpose of furthering in any way the conspiracy or undertaking. 4 Wigmore on Evidence, 3rd ed., §§ 1079 and 1077; *Lutwak v. United States*, 344 U.S. 604, 617-618, 73 S.Ct. 481, 489, 97 L.Ed. 593; *Cwach v. United States*, 8 Cir., 212 F. (2d) 520, 525; *Lennon v. United States*, 8 Cir., 20 F. (2d) 490, 494. Here, appellant Ebeling made the declaration in question for the purpose of inducing the Manchester Machine employee to go ahead and prepare the fraudulent invoices, as something that both he and Emerling desired to have done and that represented one of the steps to be taken in the fraudulent scheme. This was, of course, only an added element in the government's substantial proof of Emerling's participation, which has been set out above.

Appellants' final contention is that the Court's instructions were erroneous, because they required the jury to return a joint verdict only, of guilt or innocence, on each of the eight substantive counts, and thus deprived them of the benefit of the provision of Rule 31(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., that "If there are two or more defendants, the jury at any time during

its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed * * *."

The Court's charge called the jury's attention to the fact that the substantive counts had charged that appellants jointly had done the acts involved and stated that it therefore was not sufficient as a basis for a conviction against them that one of them may have known that the invoice involved was a false writing, but that the jury had to find, before it could convict, that "the knowledge of falsity and intent as to use in a matter within the jurisdiction of the Department of the Army, Ordnance, be known and intended by both defendants."

The Court went on to emphasize, however, that there could be no conviction of both of them on the knowledge or intent simply of one of them alone, but that "you must find the defendants each knowingly and intentionally caused the invoices referred to * * * to be made, and thereafter * * * knowingly and intentionally caused the invoice to be used as an item of cost in executing the prime contract * * * with knowledge of its falsity, and knowingly and intentionally caused the invoice to be used as a sum going to make up the total sum presented to the Army * * * and that they intended and knew it was included in the figures presented to the government's agent * * *."

This, in its effect, required the jury to find that each one of them individually was guilty of all the elements of the crime, before there was a right to convict, but on the basis of the other instruction prohibited the returning of any verdict whatever of conviction, even though one of them might have been proved to be so guilty, unless the jury found that the other also had been proved to be so guilty. In other words, while neither defendant, of course, could

be convicted on the other's guilt, each was given the advantage by the instructions of being made subject to acquittal on the other's innocence.

The according of this improper benefit, in opportunity for acquittal, could hardly be claimed by either appellant to be a prejudicial error against him. Error favorable to an appellant does not constitute a basis for reversal in a criminal case. *Stevens v. United States*, 6 Cir., 206 F. (2d) 64, 66; Rule 52(a) Federal Rules of Criminal Procedure, 18 U.S.C.A.

Appellants have been convicted of proper indictment charges, on a fair trial, under process which is free from prejudicial error, and with a result that the record persuades is just. There is no basis for either of them to ask reversal.

Affirmed.

A true copy.

Attest:

*Clerk, U. S. Court of Appeals, Eighth Circuit.*

**JUDGMENT**

# United States Court of Appeals

FOR THE EIGHTH CIRCUIT

September Term, 1956
Wednesday, August 28, 1957

Joseph Mary Ebeling and Charles G. Emerling, Appellants,
vs.
United States of America, Appellee.
No. 15582

Appeal from the United States District Court
for the Eastern District of Missouri

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgments and sentences of the said District Court in this cause be, and the same are hereby, affirmed.

And it is further Ordered and Adjudged by this Court that the defendants in the said District Court, Joseph Mary Ebeling and Charles G. Emerling, do surrender themselves to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgments and sentences imposed upon them, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

August 28, 1957.